

TAKYIWAA (Migration) [2017] AATA 104 (20 January 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Joyce Takyiwaa
CASE NUMBER:	1602459
DIBP REFERENCE(S):	CLF2015/45252 OSF2012/114241
MEMBER:	Hugh Sanderson
DATE:	20 January 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa: • cl.100.221(2)(b) of Schedule 2 to the Regulations.

Statement made on 20 January 2017 at 2:12pm

CATCHWORDS

Migration – Partner (Migrant) (Class BC) visa – Subclass 100 (Partner) – Genuine and continuing relationship – Site visit – Emotional support and companionship – Plans for the future

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulation 1994, Schedule 2, cl 100.221, r 1.15A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 February 2016 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 21 January 2013 on the basis of her relationship with her sponsor. At that time, Class BC contained one subclass: Subclass 100 (Partner).
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221 because the delegate was not satisfied that the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

BACKGROUND

5. The applicant is a citizen of Ghana and is currently 30 years old. The sponsor of the applicant is Justice Boateng. He was born in Ghana and first entered Australia in November 2003. He became an Australian citizen in 2010.
6. The parties claimed that they first met each other in 2010 and they were married on 19 January 2012 in Ghana. The applicant was granted a subclass 309 Partner (Provisional) visa on 21 August 2013. She first entered Australia on 1 November 2013. She has not departed Australia since that date.
7. The sponsor travelled overseas after the arrival of the applicant, leaving on 31 December 2014 and returning on 15 February 2015. On his incoming passenger card, the applicant stated that his emergency contact person was his brother, Victor.
8. The parties provided evidence in support of the grant of the subclass 100 Partner (Residence) visa. This included statements where they made the following claims:
 - They have opened a joint bank account as well as having their own personal accounts;
 - They jointly contribute to the expenses of the household;
 - They have travelled together on holidays;
 - The family recognises them as being in a genuine relationship; and
 - The applicant does most of the cooking and the sponsor does most of the other house work.
9. The Department arranged for a home visit on 18 November 2015. During this home visit, the following was noted:
 - The applicant was not present and the sponsor said that she was at work but did not know what time her shift finished;

- The sponsor was not able to provide significant dates in their relationship, such as the date of marriage;
- The sponsor claimed they did not do much together as they did not have much money and the last activity they did together is go to church;
- Also in the house was the sponsor's brother, Victor, Victor's wife and their baby;
- The sponsor was not able to provide the names of the applicant's parents and was not able to give specific details as to her siblings;
- The only message on his phone to the applicant was sent on 26 June 2015 stating "Joyce can u call me back pls";
- The sponsor said that the applicant's birthday was in September;
- The room the sponsor claimed he shared with the applicant had a child's cot in it, female clothes scattered around and the sponsor's clothes were packed in a suitcase at the bottom of the cupboard underneath other full suitcases; and
- The room did not appear to be lived in and appeared to be used as a storage room despite the sponsor claiming that they had been sharing that room for over a year.

10. The delegate who considered the application noted the following issues:

- The joint bank statement showed limited transactions with cash being deposited immediately before it is used;
- The home visit indicated the parties were not living together;
- The statements provided by friends and family as to the relationship did not provide convincing information;
- There was limited information by way of photos or other documents to indicate the parties had spent much time together;
- The lack of information on the sponsor's phone indicated the parties do not communicate to the degree which would be expected if they were in a genuine relationship;
- The sponsor provided the wrong birthday for the applicant as well as not being able to provide other dates of significant events; and
- The cards addressed to each other appear to have been generated simply for immigration purposes.

11. Taking these issues into account, the delegate was not satisfied that the parties were in a genuine and continuing relationship and was not satisfied that the applicant was the spouse of the sponsoring partner as defined in s.5F of the Act. Accordingly, the delegate found that the applicant did not meet the criteria in cl.100.221(2). The delegate found that the applicant did not meet any alternate criteria and refused the application.

INFORMATION TO THE TRIBUNAL

12. The applicant provided further information to the Tribunal including the following:

- Details of the parties bank accounts;
 - Tax assessment notices;
 - Joint residential tenancy agreement;
 - Numerous photos of the parties together at various social events;
 - Receipts for the purchase of various items; and
 - Statements by relatives and friends attesting to the genuineness of the relationship.
13. The applicant appeared before the Tribunal on 20 January 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The applicant was represented in relation to the review by her registered migration agent who attended the hearing.
 14. The parties provided consistent information as to various aspects of their lives together. This included details of where they are currently living, their social activities with the church, details of each other's families and contact they have them, details of their work and study, and their plans for their future together including having children.
 15. Although there were some inconsistencies in the information provided by the parties, this did not undermine the overall credibility of the information provided and the inconsistencies were small and generally were matters of perception rather than any significant discrepancy.
 16. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether the applicant is the spouse of the sponsoring partner as defined in s.5F of the Act.

18. Whether the parties are in a spouse or de facto relationship

19. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, amongst other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring partner' within the meaning of that term.
20. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties'

household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

21. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married in Ghana on 19 January 2012. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

FINANCIAL ASPECTS

22. Neither the applicant nor the sponsor has any significant assets in their own name. It is not surprising, therefore, that the parties do not have any significant assets in their joint names. The parties have entered into a joint residential tenancy for the home in which they currently live. They were previously living in the home of the sponsor's brother. The parties each have their own bank accounts into which their pay is deposited. The arrangements they have for the payment of their rent and other regular expenses is that they each contribute to the joint bank account and the applicant arranges the payment of all expenses. The parties were aware of each other's financial circumstances. The parties own a car together.
23. The applicant has sent money to her family in Ghana to be able to purchase land there. That real estate is not registered in her name. The sponsor was aware that money had been sent to the applicant's family in Ghana and purchased land with the hope that at some point in the future a home may be built on that property.
24. Although limited in nature due to the limited financial resources of the applicant and the sponsor, the Tribunal finds the financial aspects of the relationship are indicative of a genuine relationship. Although having separate bank accounts, the parties do pool their financial resources to meet their day-to-day household expenses.

HOUSEHOLD

25. Since arriving in Australia, the parties have lived together in the same household. They were initially living in the home of the sponsor's brother and have, since June 2016, lived together in a jointly rented property in Cabramatta. Correspondence has been provided addressed to the parties at this address. The parties provided consistent and convincing evidence before the Tribunal of the arrangements in that house, including who is responsible to pay the bills for the home, who was primarily responsible for cooking and cleaning and the other arrangements for the household.
26. Overall, the Tribunal is satisfied that the parties have established a household together and have been living together on a permanent basis in a manner that is indicative of a genuine and continuing relationship.

SOCIAL ASPECTS

27. The parties provided statements from friends and relatives stating that they recognise the parties as being in a genuine and continuing relationship. The parties provided photos of themselves together at various social events with the family members of the sponsor and also at their church. The parties were aware of various activities each other participated in, including the applicant being a member of the church choir.

28. The parties provided details of their wedding ceremony. The sponsor's brother, Victor, travelled with the sponsor to Ghana to be able to attend the wedding. The parties were able to provide details of each other's families activities, including details of the sponsor's brother's relationship with his wife and children who are currently living in the United States.
29. The Tribunal is satisfied that the evidence presented by the parties support a finding that they present themselves as being married to each other and that this relationship is accepted by their friends and relatives as genuine.

COMMITMENT TO THE RELATIONSHIP

30. The parties were first introduced to each other in 2010. They were married in January 2012. They have now been married for five years. They have been living together in Australia since November 2013.
31. The parties displayed to the Tribunal the degree of companionship and emotional support which would be indicative of a genuine and continuing relationship. They were aware of each other's work and studies. They provided consistent information as to their plans for their future, including having children together once the sponsor completes his University studies.
32. Overall, the Tribunal is satisfied that the parties have displayed a degree of commitment to the relationship which would be expected in a genuine and continuing relationship. The Tribunal is satisfied that the parties display a mutual commitment to their relationship and have discussed their future together in Australia.

OTHER RELEVANT ISSUES

33. The sponsor returned to Ghana in December 2014 to visit family there. He did not travel with the applicant as she had only recently commenced her employment and, due to their limited financial resources, the costs of both the applicant and the sponsor returning to Ghana at that time would have been prohibitive.
34. The sponsor's incoming passenger card nominated his brother as the emergency contact person. The Tribunal accepts that the sponsor did this as he believed that his brother, with whom he was living with at the time, would be in the best position to be able to contact all necessary people and respond to any emergency. This was, in part, because he had lived in Australia for longer than the applicant and his English language skills were superior to hers. The Tribunal accepts that this was a legitimate reason for the sponsor to nominate his brother and not the applicant as his emergency contact person and does not undermine the claims of the parties being in a genuine relationship.
35. The Tribunal has taken into account the report from the departmental officers who conducted the home visit on 18 November 2015. It is noted that the applicant was not present during the home visit as she was at work.
36. The Tribunal has had the opportunity of questioning the applicant and the sponsor together. As indicated above, they generally provided consistent information as to different aspects of their relationship together. Although the sponsor was not particularly accurate when providing dates of particular events even when those dates were related to his own particular activities, the information he and the applicant gave in relation to various aspects of their lives together including activities they have participated and the discussions they have had were all generally consistent. Having had the advantage of observing the applicant and the sponsor together, the Tribunal finds that they do display the degree of emotional support and companionship to each other and that they have a knowledge of each other's affairs and activities which would be expected in a genuine and continuing relationship.

37. The Tribunal has considered the circumstances of the parties both individually and cumulatively. The Tribunal is satisfied that when considered together the weight of evidence supports a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that their relationship is genuine and continuing and that they lived together.
38. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship.
39. Therefore the applicant meets cl.100.221(2)(b).
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 100 visa.

DECISION

41. The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa:
 - cl.100.221(2)(b) of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).